B6

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 29 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

[redacted]ntifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The case will be remanded for further consideration.

The petitioner is a jeweler. It seeks to employ the beneficiary permanently in the United States as a diamond setter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 13, 2001. The proffered wage as stated on the Form ETA 750 is $12.39 per hour, which equals $25,771.20 per year.

On the petition, the petitioner stated that it was established during 1989 and that it employs four workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Oak Park, Michigan.

In support of the petition, counsel submitted the petitioner's 2000 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation and the petitioner's compiled financial statements for the ten months ended October 31, 2002.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The financial statements submitted were produced pursuant to a compilation rather than an audit. Financial statements

produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The 2000 tax return shows that the petitioner declared a loss of $6,607 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $720,301 and current liabilities of $503,225, which yields $217,067 in net current assets.

The tax returns submitted, however, show that the petitioner reports taxes based on the calendar year. Because the priority date is March 13, 2001, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 tax return shows that the petitioner declared a loss of $56,916 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $647,696 and current liabilities of $485,936, which yields $161,760 in net current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on June 9, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 2002 Federal Income Tax Return.

The request for evidence incorrectly stated that the petitioner is apparently a sole proprietorship and asked for evidence of the proprietor's income, assets, and expenses. Counsel noted that error in a cover letter, dated August 26, 2003, and submitted with the petitioner's response.

The response included a 2002 Form W-2 showing the amount the petitioner paid to an employee. Counsel also submitted a copy of the 2002 joint Form 1040 U.S. Individual Income Tax Return of that employee and his spouse. In the cover letter counsel identified that employee as the beneficiary's potential employer. This office assumes that counsel means that same employee is the petitioner's owner or majority owner.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 15, 2003, denied the petition.

On appeal, counsel states,

> The decision is based on erroneous conclusions of facts and law. Further, it appears that the reviewing officer failed to consider additional evidence which [sic] was timely submitted in response to the RFE on August 28, 2003.

The evidence to which counsel apparently refers is the evidence pertinent to the finances of the petitioner's vice-president and putative majority owner. The petitioner, however, is a corporation and not a sole proprietorship. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and

obligations of the owners, the stockholders, or anyone else.[1] As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. The information pertinent to the income and assets of its owners shall not be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In the decision of denial the director incorrectly included the amount of the petitioner's depreciation deduction in the determination of the petitioner's ability to pay the proffered wage. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. That amount may not now be shifted to some other year or treated as a fund available to pay the proffered wage.

---

[1] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $25,771.20. The priority date is March 13, 2001.

During 2001 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income. At the end of that year, however, the petitioner had $161,760 in net current assets. The petitioner has demonstrated the ability to pay the proffered wage out of its net current assets during 2001.

When the request for evidence was issued, on June 9, 2003, the petitioner's 2002 tax return was likely available. The Service Center, in error, requested the 2002 tax return of the petitioner's proprietor and received the return of the petitioner's vice-president. As the Service Center made clear that it was not requesting the petitioner's own 2002 return, the petitioner may not now be penalized for failing to provide it. The petitioner has demonstrated the ability to pay the proffered wage during 2001, the only salient year for which evidence was requested.

An additional issue exists not noted in the decision of denial. The evidence in support of the beneficiary's qualifying employment states, in its top margin,

> THE FOLLOWING IS A SUGGESTED FORM AFFIDAVIT WHICH SHOULD BE TYPED ON COMPANY LETTERHEAD, IF POSSIBLE, IN ENGLISH AND CONFORMED TO THE FACTS AS YOU KNOW THEM AND SWEAR THEM TO BE.

Instead of following those directions, the affiant apparently merely added some responses to the suggested affidavit. The responses vary in appropriateness. The first line of the body of the affidavit, for instance, reads, "I, [redacted] am/wa[redacted] cac[redacted]

The affidavit continues, "During this period I was his title (ex. Supervisor)." The affidavit goes on to describe duties which the beneficiary allegedly performed and which the affiant allegedly supervised. Given the responses, however, whether the affiant understood what he or she was attesting to is unclear. Further, the beneficiary's name is [redacted] and the company at which he allegedly works is [redacted] ewelry. The similarity appears to indicate that the jewelry store at which the beneficiary is

allegedly employed belongs to the beneficiary. Under these circumstances, whether the beneficiary is likely to have a supervisor is open to question.

The matter will be remanded for a new decision. The director may wish to require more reliable evidence of the beneficiary's employment claim. On remand the director may also request the petitioner's 2002 tax return or the returns pertinent to any other salient year, or any other relevant evidence.

ORDER: The petition is remanded for further consideration and action in accordance with the foregoing.